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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 15 2008

SRC 04 039 51269

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that it had not established that the beneficiary has the requisite two years of experience listed on the labor certification. The director denied the petition accordingly.

On appeal counsel submitted a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750

Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on February 15, 2001. The proffered wage as stated on the Form ETA 750 is $450 per week, which equals $23,400 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

On the Form ETA 750, Part B the beneficiary claimed to have worked for seven different Chinese restaurants between August 1992 and the priority date.

The petition in this matter was submitted on November 24, 2003.[1] The petition states that the petitioner was established during November 1997 and that it employs three workers. The spaces provided for the petitioner to state its gross and net incomes were left blank. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.[2] Both the petition and the Form ETA 750 indicate that the beneficiary would be employed in Ponchatoula, Louisiana.

In support of the petition, counsel submitted (1) portions of the 2000 Form 1120, U.S. Corporation Income Tax Return of Six Fortune Chinese Restaurant of Hammond, Louisiana, (2) the 2000 Form 1120, U.S. Corporation Income Tax Return of Campus Links Incorporated, (3) the 2001 Form 1120, U.S. Corporation Income Tax Return of Campus Link Incorporated dba Six Fortune III Chinese Restaurant, (4) printouts showing ownership of real estate by Six Fortune Chinese Restaurant of Hammond, Louisiana and by Brian Tzeng, who is the petitioner's owner or part-owner, (5) photocopies of monthly bank statements pertinent to accounts held by Six Fortune Incorporated of Hammond, Louisiana, Six Fortune Incorporated of Ponchatoula, Louisiana, and Campus Links Incorporated[3] of Ponchatoula, Louisiana, (6) an affidavit dated August 4, 2003 from Brian Tzeng stating that he has the ability to pay the wage proffered in this case out of his personal funds, (7) Brian Tzeng's 2000 and 2002 Form 1040A U.S. Individual Income Tax Returns, (8) two employment verification letters, and (9) photocopies of 1993, 1995, 1996, 1999, and 2000 Form W-2 Wage and Tax Statements showing payments to the beneficiary by various companies, but not the petitioner in this case.

The 2000 tax return of Six Fortune Chinese Restaurant of Hammond, Louisiana[4] shows that it was a corporation, that its Employer Identification Number (EID) is 72-1102619, that it incorporated on October 25,

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[1] The record contains other petitions and applications for and by the instant beneficiary, including an additional Form I-140 submitted by the instant petitioner. This decision addresses only the petition submitted on November 24, 2003 with receipt number SRC 04 039 51269 and the proceedings pertinent to that petition.

[2] The beneficiary claimed to have worked for the Six Fortune restaurant and the Six Fortune II, but did not claim to have worked for the petitioner, the Six Fortune III Chinese Restaurant.

[3] The bank statements pertinent to Campus Links Incorporated are for months during 2002 and 2003. According to its 2000 tax return the original Campus Links Incorporated ceased to exist, at least as a subchapter C corporation, by the end of 2000. This office infers that those bank statements pertain, therefore, to Campus Links Incorporated dba Six Fortune Chinese Restaurant.

[4] The address given for that restaurant on its 2000 tax return is the same address given for the beneficiary on the petition, the beneficiary's personal tax returns, W-2 forms, and various other documents in the record. That the beneficiary uses that address as his own may indicate a relationship other than a business relationship between the beneficiary and the

1988, that it reports taxes pursuant to the calendar year, and that the 2000 return was its final return.[5] During 2000 the Six Fortune Chinese Restaurant declared a loss of $2,717 as its taxable income before net operating loss deductions and special deductions. Because the corresponding Schedule L was not submitted its end-of-year net current assets could not be computed.

The 2000 tax return of Campus Links Incorporated shows that it was a corporation, that its EID is 72-1461746, that it incorporated on January 1, 2000, that it reported taxes pursuant to the calendar year, and that its 2000 return was its final return. During 2000 Campus Links reported a loss of $584 as its taxable income before net operating loss deductions and special deductions. Because the corresponding Schedule L was not submitted its end-of-year net current assets could not be computed.

Because the priority date of the petition in this matter is February 15, 2001 evidence pertinent to the restaurant's finances during the 2000 calendar year is not directly relevant to its continuing ability to pay the proffered wage beginning on the priority date. Further, this office notes that information taken from the 2000 returns indicates that neither of the taxpayers named on them is the petitioner in this case.

The 2001 return submitted shows that Campus Link Incorporated dba Six Fortune III Chinese Restaurant is a corporation, that its EID is 72-1461746, that it incorporated on August 1, 2001, that it reports taxes pursuant to the calendar year, and that the 2001 return was its initial return.[6] That return indicates that during 2001 Campus Link Incorporated dba Six Fortune III Chinese Restaurant declared a loss of $10,073 as its taxable income before net operating loss deductions and special deductions. Because the corresponding Schedule L was not submitted that entity's end-of-year net current assets could not then be computed.

The 1993 W-2 form submitted shows that the Peking Duck House paid the beneficiary $2,200 during that year.

The 1995 W-2 forms submitted show that during that year the beneficiary received $3,600 from Shu Kuang Yang China Inn and $900 from China Rose.

The 1996 W-2 forms submitted show that Yu Family Incorporated dba Imperial Garden Chinese Restaurant paid the beneficiary $1,200 and that Shu Kuang Yang China Inn paid the beneficiary $2,800 during that year.

The 1999 W-2 form submitted shows that Yu Family Incorporated dba Imperial Garden Chinese Restaurant paid the beneficiary $2,800 during that year.

Tzeng family. Such an additional relationship may cast doubt on the legitimacy of the job offer in this matter. *See Matter of Summart,* 374, 00-INA-93 (BALCA May 15, 2000). Because the decision of denial did not rely upon that basis today's decision will not be based, even in part, on it. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

[5] In this context "final return" indicates that the entity does not contemplate filing another Form 1120, U.S. Corporation Income Tax Return for the ensuing year.

[6] This appears to be inconsistent with the information from the 2000 return of Campus Links Incorporated, which indicates that it had the same EID that Campus Links Incorporated dba Six Fortune Chinese Restaurant has.

The 2000 W-2 forms show that Yu Family Incorporated dba Imperial Garden Family Restaurant and China Town Kitchen Incorporated paid the beneficiary $500 and $2,400 during that year, respectively.

One of the employment verification letters submitted is dated January 26, 2001. That letter states,

> I hereby authorize [sic] that [the beneficiary] worked at Imperial Garden Chinese Restaurant in 1996 1999 2000 as a cook."

The title of the person who composed that letter is not stated and the signature on that letter is illegible.

The other employment verification letter then submitted, dated April 9, 2001, is from Six Fortune Chinese Restaurant of Hammond, Louisiana. The body of that letter states,

> This certifies that [the beneficiary] has been a Seasonal Chef for Six Fortune Restaurant from 1993 until December 2000.

The letter appears to have been signed by I. Sing Tzeng. His title is not provided.

Because the evidence submitted was insufficient to demonstrate the continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary has the requisite two years of experience, the Texas Service Center, on September 17, 2004, requested, *inter alia*, additional evidence pertinent to that ability and the beneficiary's experience. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements. The service center also specifically requested (1) a complete copy of the petitioner's 2001 tax return, (2) copies of W-2 forms issued to the beneficiary for 2001, 2002, and 2003, (3) additional evidence in support of the beneficiary's claim of qualifying employment, and (4) evidence that Campus Links Incorporated dba Six Fortune III Chinese Restaurant, which incorporated on August 1, 2001, is the successor-at-interest of the original petitioner, which filed the Form ETA 750 labor certification application in this matter on February 15, 2001.

In response, counsel submitted (1) copies of the 2001 Form 1120, U.S. Corporation Income Tax Return and Form 1120X Amended U.S. Corporation Income Tax Return, of Campus Link Incorporated dba Six Fortune III Chinese Restaurant, (2) printouts of web content showing that the various restaurants owned by the petitioner's owner's family are corporations in good standing, (3) the beneficiary's 2001 and 2002 Form 1040EZ personal income tax return, (4) portions of the beneficiary's 2003 personal income tax return, (5) copies of 2001, 2002, and 2003 W-2 forms issued to the beneficiary, (6) a letter dated November 29, 2004 from counsel, and (7) a letter dated November 24, 2004 from another attorney.

The revised 2001 tax return of Campus Link Incorporated dba Six Fortune III Chinese Restaurant shows that it declared a loss of $69,476 as its taxable income during that year, rather than a loss of $10,073 as previously reported. The corresponding Schedule L shows that at the end of that year Campus Link Incorporated dba Six Fortune III Chinese Restaurant had $314 in current assets and no current liabilities, which yields net current assets of $314.

That return also shows that Campus Link Incorporated dba Six Fortune III Chinese Restaurant was incorporated on January 1, 1998 and that its 2001 return was not its final return. That information contradicts information given on its original 2001 return.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The 2001 W-2 forms submitted show that Young's Garden Incorporated and China Town Kitchen Incorporated paid the beneficiary $4,331.34 and $4,800 during that year, respectively. The 2002 W-2 forms submitted show that Young's Garden Incorporated and China Town Kitchen Incorporated paid the beneficiary $1,949.10 and $7,800 during that year, respectively. The 2003 W-2 form submitted shows that China Town Kitchen Incorporated paid the beneficiary $7,200 during that year.

The petitioner issued none of the beneficiary's 2001, 2002, or 2003 W-2 forms.[7] As such, they are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Further, they do not reliably demonstrate any employment prior to the February 15, 2001 employment date and are not, therefore, directly relevant to the beneficiary's qualifying employment before the priority date.

In his November 29, 2004 letter counsel stated,

> Please note that the owner's [sic} of said restaurant also own personal properties and monies that may be transferred into the corporation at any time. However, the companies are self supporting.

The letter from the other attorney gave a history of the restaurants owned by the Tseng family, including Campus Link Incorporated dba Six Fortune III Chinese Restaurant. As to that entity the attorney stated, "Campus Links, Incorporated d/b/a Six Fortune III has continuously operated [the petitioning restaurant] since 2001," but did not state when during 2001 that corporation acquired the restaurant.

The attorney further stated that the Tzeng family restaurants are all closely held corporations, that members of the Tzeng family buy and sell real estate, contract for goods and services, are obligated on commercial leases. Finally, the attorney stated,

> I can attest that of my personal knowledge that [sic][the Tzeng family] and their wholly owned corporations were able to pay the proffered wage from February 15, 2001 to August 15, 2001.

Counsel did not provide evidence to show that Campus Link Incorporated dba Six Fortune III Chinese Restaurant is identical to, or the successor-at-interest of, the petitioner in this case.

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[7] That is, neither Campus Link Incorporated nor Six Fortune III Chinese Restaurant issued any of those W-2 forms.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and did not demonstrate that the beneficiary has the requisite two years of experience. The director denied the petition on January 7, 2005. As to the beneficiary's employment history the director noted that although the beneficiary's employment letters appear to indicate that the beneficiary worked continuously during the years stated, the amounts shown on the W-2 forms submitted are inconsistent with full-time employment. The director also noted that the file contains no other evidence that the beneficiary accumulated the equivalent of two years of full-time employment as a cook.

On appeal, counsel submitted the 2002 and 2003 Form 1120, U.S. Corporation Income Tax Returns of Campus Link Incorporated dba Six Fortune III Chinese Restaurant, an additional employment verification letter, and a brief.

The 2002 and 2003 returns both show that Campus Link Incorporated dba Six Fortune III Chinese Restaurant incorporated on August 1, 2001. Neither of those returns purports to be that entity's initial or final return.

During 2002 Campus Link Incorporated dba Six Fortune III Chinese Restaurant reported taxable income before net operating loss deductions and special deductions of $21,202. The corresponding Schedule L shows that at the end of that year that company had net current assets of $66,581 and no current liabilities, which yields net current assets of $66,581.

During 2003 Campus Link Incorporated dba Six Fortune III Chinese Restaurant reported a loss of $24,198 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows neither current assets nor current liabilities, which yields net current assets of $0.

The additional employment verification letter, dated February 2, 2005, purports to be from Young's Garden Chinese Restaurant.[8] The body of that letter states,

> [The beneficiary] was a [sic] employee at my restaurant during the period between 2002 – 2004. He was a full[-]time employee working in the kitchen. His compensation includes wages and personal expenses which were paid by the restaurant. He is a very competent Chinese chef. His [sic] possess [sic] ample culinary skills in the art of Chinese cooking. He was a very valuable asset to my restaurant.

Julia Kuan Tai Leong, whose position with that restaurant is not stated, signed that letter. The letter states that the beneficiary worked full-time but does not give the exact dates of his employment.

In the brief counsel notes that the Tzeng family has, in addition to personal income and assets, several other restaurants that could contribute to the petitioner as necessary to pay the proffered wage. Counsel argues that, in the case of a closely held corporation the income and assets of the owners can be included in the

[8] That letter is not on that restaurant's letterhead, but typed and handwritten on a plain sheet of paper and photocopied with that restaurant's business card in the upper right hand corner.

assessment of the corporation's ability to pay the proffered wage. Counsel cites no authority for that proposition and does not further explain his reasoning.

Counsel further argues that corporate tax returns are not valid indices of a petitioner's ability to pay the proffered wage because they include depreciation deductions that do not represent actual expenses. Counsel asserts that the petitioner's depreciation deductions should be added to its net income during the salient years. In addition, counsel asserts that the petitioner's retained earnings should be added to those amounts in determining the petitioner's ability to pay the proffered wage.

Finally, counsel urges that the loss declared during 2001 was the result of a casualty loss.

As to the beneficiary's employment experience counsel states that the employment verification letters did not imply that the beneficiary worked continuously during the stated years for the restaurants that provided those verifications. Counsel lists periods during which he asserts that the beneficiary worked for the various restaurants.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. The beneficiary's claim of qualifying employment must be amply supported by competent evidence, rather than assertions of counsel.

Counsel notes that the employment history listed on the Form ETA 750B claims a total of eight years of salient experience. Counsel states that the beneficiary's employers generally paid him cash, kept few records of his employment, and are generally unwilling to provide documentation because of the beneficiary's legal status. Counsel stated, however, that the W-2 forms and the employment verification letters show that he accumulated the equivalent of two years of full-time experience as a cook.

The evidence of real estate ownership is not a factor in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The real estate printouts suggest that members of the Tzeng family own three properties, though they may have been alienated since those printouts were produced.[9] The printouts list an assessed value, but no estimate of market value, which is not necessarily equal.[10] They do not indicate whether or to what extent the properties may be encumbered.[11] For all of those reasons the evidence is insufficient to demonstrate the equity of the petitioner or the petitioner's owner in the parcels of real estate in question.

Not only is the equity in the real estate in question not demonstrated, as was detailed above, but even if it were, that would be insufficient to render the petition approvable. The petitioner's or petitioner's owner's

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[9] The ownership of real property would typically be determined by a professional title search.

[10] An impartial estimate of the market value of real property would ordinarily be undertaken by a qualified real estate appraiser.

[11] Whether a property is encumbered would also be determined by a professional title search.

equity in real estate is not ordinarily a net current asset. Current assets, or short-term assets, are those assets of a business that are expected to be converted to cash or cash equivalent within a short period, generally one year. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year.[12]

The value of the petitioner's or the petitioner's owners' equity in real estate is not expected to be realized in cash or cash equivalent within the coming year. Further, real estate is not the sort of liquid asset generally available to pay wages. For this additional reason, the petitioner's and the petitioner's owners' equity in real estate would not be considered even if proven.

Further still, the petitioner is a corporation.[13] A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders they are not obliged to pay the debts of the corporation, and the assets of its shareholders or of other enterprises or corporations cannot, therefore, be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Notwithstanding counsel's assertion that this distinction should be blurred in the case of closely held corporations, nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owners, as evidenced by [redacted] income tax returns and affidavit; the evidence of real estate holdings; income tax returns pertinent to the Tzeng family's other holdings, including restaurants; and other income or assets of the petitioner's owners or others, shall not be further considered.

The conclusion of the attorney in his letter of November 24, 2004 that the petitioner has the ability to pay the proffered wage is unconvincing. First, counsel appears to indicate that the conclusion is based on the fact that members of the Tzeng family invest in real estate, contract for goods and services, and are obligated on commercial leases. None of that demonstrates that they are personally obliged, or even able, to pay the debts and obligations of the petitioning corporation, such as the proffered wage, and counsel's opinion does not, therefore, indicate that the distinction between the corporation and its owners should be blurred or disregarded.

In addition, the attorney stated that he is able to affirm, of his own personal knowledge, that the Tzeng family and their corporations are able to pay the wage proffered in this case. Again, counsel appears to be basing his conclusion on the income and assets of the Tzeng family, rather than on those of the corporate petitioner. Again, the income and assets of the Tzeng family cannot be utilized to show the petitioner's ability to pay the proffered wage. Counsel states no other basis for his conclusion pertinent to the ability to pay the proffered wage.

Counsel asserts that the petitioner's tax returns do not show the true financial condition of the corporation. That assertion, however, neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the

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[12] The location of net current assets on a tax return and the calculation of net current assets are addressed further below.

[13] That is, Campus Link Incorporated dba Six Fortune III Chinese Restaurant, which is pursuing approval of the visa petition, is a corporation.

obligation of proving that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Counsel has provided no reliable evidence of other funds, not shown on the tax returns, sufficient to pay the proffered wage.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.[14] Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income is therefore duplicative, at least in part.

Further, even if considered separately from net income, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on a tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer to pay to its employees in cash while continuing in business. They are not, therefore, an index of a company's ability to pay additional wages.

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[14] Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

Whether any of the bank accounts submitted pertain to the petitioner in this case is unclear. In any event, bank balances are not generally acceptable evidence of a petitioner's continuing ability to pay the proffered wage beginning on the priority date, and counsel's reliance on the bank statements in this case is misplaced.

First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.[15] Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the

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[15] A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the taxpayer's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[16] shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is $23,400 per year. The priority date is February 15, 2001.

As was noted above the record does not clearly demonstrate that Campus Link Incorporated dba Six Fortune III Chinese Restaurant is identical to, or the successor-at-interest of, the petitioner in this case. That issue is addressed below. In the determination of the petitioner's ability to pay the proffered wage, however, this office will assume, arguendo, that Campus Links Incorporated dba Six Fortune III Chinese Restaurant is identical to the petitioner.

During 2001 Campus Link Incorporated dba Six Fortune III Chinese Restaurant declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had net current assets of $314. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage.

Counsel asserts, however, that Campus Link Incorporated dba Six Fortune III Chinese Restaurant suffered a casualty loss during 2001, and that its effect on the net income of Campus Link Incorporated dba Six Fortune III Chinese Restaurant during that year should be considered. Counsel is correct that if Campus Link Incorporated dba Six Fortune III Chinese Restaurant's loss during a given year was uncharacteristic, occurred within a framework of profitable or successful years, and is demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The amount of the 2001 casualty loss of Campus Link Incorporated dba Six Fortune III Chinese Restaurant is a one-time exigent expense unlikely to recur, and this office will disregard it for the purpose of determining the ability to pay the proffered wage during 2001.

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[16] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

Although counsel does not state the amount of that casualty loss the amended 2001 tax return appears to indicate that it was approximately the same as the difference between the taxable income before net operating loss deductions and special deductions of Campus Link Incorporated dba Six Fortune III Chinese Restaurant as initially reported and its taxable income before net operating loss deductions and special deductions as amended. Even without that amendment, however, the 2001 taxable income before net operating loss deductions and special deductions of Campus Link Incorporated dba Six Fortune III Chinese Restaurant was a loss, and it is insufficient, therefore, to demonstrate the petitioner's ability to pay any portion of the proffered wage during that year. Campus Link Incorporated dba Six Fortune III Chinese Restaurant has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 Campus Link Incorporated dba Six Fortune III Chinese Restaurant declared taxable income before net operating loss deductions and special deductions of $21,202. That amount is insufficient to pay the proffered wage. At the end of that year, however, Campus Link Incorporated dba Six Fortune III Chinese Restaurant had net current assets of $66,581. That amount is sufficient to pay the proffered wage. Campus Link Incorporated dba Six Fortune III Chinese Restaurant has demonstrated the ability to pay the proffered wage during 2002.

During 2003 Campus Link Incorporated dba Six Fortune III Chinese Restaurant declared a loss. Campus Link Incorporated dba Six Fortune III Chinese Restaurant is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year Campus Link Incorporated dba Six Fortune III Chinese Restaurant had net current assets of $0. Campus Link Incorporated dba Six Fortune III Chinese Restaurant is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. Campus Link Incorporated dba Six Fortune III Chinese Restaurant submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. Campus Link Incorporated dba Six Fortune III Chinese Restaurant has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to demonstrate its ability to pay the proffered wage during 2001 and 2003. Therefore it failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date as required by 8 C.F.R. § 204.5(g)(2). The petition was correctly denied on that basis.

The remaining issue discussed in the decision of denial is whether the beneficiary is qualified for the proffered position pursuant to the requirements stated in the approved Form ETA 750 labor certification. The labor certification requires two years of experience as a cook.

The beneficiary alleged on the Form ETA 750B that he has worked as a cook for various restaurants since August 1992. Employment verification letters were provided in support of the beneficiary's claim of employment for three of those restaurants, Imperial Garden Chinese Restaurant; Six Fortune Chinese Restaurant of Hammond, Louisiana; and Young's Garden Chinese Restaurant. In addition, numerous W-2 forms were submitted showing wages that various restaurants paid to the beneficiary.

None of the employment verification letters submitted describes the duties of the beneficiary in detail. They are from Chinese restaurants, however, and indicate that the beneficiary worked as a cook. This office finds

that to be a sufficient description of the beneficiary's experience to satisfy that requirement of 8 C.F.R. § 204.5(l)(3)(ii)

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), however, also requires that the employment verification letters submitted include the name, address, and job title of the person verifying the beneficiary's employment. The job title of the individuals who provided the beneficiary's employment verification letters, however, is not given. Other than one of the letters referring to "my restaurant," none of the letters even states that the writer works at or has any interest in the restaurants. Even if the affiants did work at those restaurants, the letters do not demonstrate that their positions at those restaurants were such that they are able to attest to the duration of the beneficiary's employment or his duties at those restaurants.

Further, the letters from Imperial Garden Chinese Restaurant and Six Fortune Chinese Restaurant of Hammond, Louisiana; do not indicate that the beneficiary worked full-time. As counsel himself observed, that an employment letter states that the beneficiary "worked at Imperial Garden Chinese Restaurant in 1996 1999 2000," or that he "has been a Seasonal Chef . . . from 1993 until December 2000" does not mean that he worked continuously during those years or that he worked full-time. It does not indicate the frequency of his employment at all, except that he worked at least one day during each of those years.[17]

The remaining letter, from Young's Garden Chinese Restaurant, states that the beneficiary's employment was full-time, but does not indicate the date the beneficiary's employment began, except to state that it was during 2002, or the date that it ended, except to state that it was during 2004. That letter might attest to just over one year of employment, or it might attest to almost three years. Further, as the priority date in this matter is February 15, 2001, and the experience at Young's Garden Chinese Restaurant occurred after that date, it is not relevant to the beneficiary's qualifications as of the priority date, which is the salient consideration in this matter.

The W-2 forms submitted that were issued before the priority date[18] show that Imperial Garden Chinese Restaurant paid the beneficiary a total of $4,500. No W-2 forms from Six Fortune Chinese Restaurant or Young's Garden Chinese Restaurant were submitted. Even if the evidence were sufficient to show that the beneficiary worked for Imperial Garden Chinese Restaurant as a cook, a total wage payment of $4,600 is insufficient to demonstrate the equivalent of two years of full-time employment.

Additional W-2 forms show that the beneficiary earned an additional $11,900 during 2000 and previous years. Although the beneficiary states that this employment was as a cook, no evidence in the record supports that assertion. Again, even if the record demonstrated that the beneficiary worked as a cook at those restaurants, that amount does not suggest that the beneficiary worked for two years before the priority date.

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[17] This office disagrees in this regard with the director's statement in the decision of denial that the employment verification letter from Imperial Garden Chinese Restaurant implies that the beneficiary's employment there was continuous.

[18] Some portion of the wages declared on the 2001 W-2 forms may evince employment prior to the February 15, 2001 priority date in this matter. That possibility has not been demonstrated, however, and no amount of that possible experience will be considered in determining the beneficiary's qualifications on the priority date.

Counsel asserts that much of the beneficiary's compensation was off the books, including some payments of the beneficiary's expenses, and that employers of undocumented workers typically do not wish to confirm employment. Those assertions neither demonstrate the veracity of the beneficiary's employment claim nor relieve the petitioner of the obligation of proving it. No evidence in the record supports counsel's assertion. Further, the assertions of counsel, as was noted above, are not evidence in themselves. *INS v. Phinpathya, supra, Matter of Ramirez-Sanchez, supra.*

For these various reasons the evidence submitted does not demonstrate that the beneficiary had the requisite two years of experience as a cook on the priority date. The petition was correctly denied on this additional basis.

The petitioner failed to demonstrate that the beneficiary has the requisite two years of qualifying experience. The petition was correctly denied on this additional basis.

The record suggests an additional issue that was not discussed in the decision of denial. The petitioner, Six Fortune III Chinese Restaurant, filed the Form ETA 750 on February 15, 2001. Several of the tax returns of Campus Link Incorporated dba Six Fortune III Chinese Restaurant state that it incorporated on August 1, 2001. If this is so, and the original petitioner is not identical with Campus Link Incorporated dba Six Fortune III Chinese Restaurant, the entity now pursuing approval of the visa petition in this case, then the substituted petitioner is obliged to demonstrate that it is entitled to rely on the labor certification issued to the original petitioner.

The substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. No such evidence appears in the record. *See Matter of Dial Auto Repair Shop, Inc., supra.*

The substituted petitioner is also obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *Dial Auto Repair Shop, Inc., supra.*

The priority date is February 15, 2001. If Campus Link Incorporated dba Six Fortune III Chinese Restaurant did not incorporate until August 1, 2001 it could not have operated the petitioning restaurant between February 15 and August 1 of that year. The substituted petitioner is obliged to provide evidence of the then-owner of the restaurant, presumably the original petitioner, to pay the proffered wage during that period. No reliable evidence of the ability of the original petitioner to pay the proffered wage appears in the record. The record does not demonstrate that the original petitioner could have paid the proffered wage beginning on the priority date and continuing during the time it owned the restaurant.

The petition should have been denied for these two additional reasons. Because they were not noted in the decision of denial, however, and the petitioner has not been accorded an opportunity to address them, those

additional issues form no part of the basis for today's decision. If the petitioner attempts to overcome the instant decision on motion, however, it should address both issues.

The petitioner failed to demonstrate that it had the continuing ability to pay the proffered wage beginning on the priority date and failed to demonstrate that the beneficiary is qualified for the proffered position. The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.